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No. 10-170

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In The
Supreme Court of the United States

OFFICER BRIAN MARTIN, OFFICER JASON BROWN, OFFICER SCOTT STRAUB, SERGEANT TIM SELVIA, SERGEANT KEVIN HUNTER, LIEUTENANT KEVIN ZELT, DEPUTY CHIEF MARTIN A. BENDER, and DEPUTY CHIEF DOUGLAS A. LUCKER, each in his individual capacity,

Petitioners,

v.

ESTATE OF RUDY ESCOBEDO (Deceased), RAQUEL HANIC, Personal Representative of Estate,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

A. The Seventh Circuit Applies An Impermissible Qualified Immunity Standard

Respondent's primary argument in opposing the Petition for Writ of Certiorari is that the Seventh Circuit correctly applied this Court's qualified immunity standards in holding that the officers here had "more than enough warning to tell them when and how they could appropriately use tear gas and flash bang grenades to extricate a barricaded, suicidal individual for an emergency medical detention." (Brief in Opposition at p. 15). Respondent suggests that the Petitioners attempt to "trick" this Court into concluding that the Seventh Circuit has departed from traditional qualified immunity standards which requires that officials be given fair warning that their conduct is unlawful. (Brief in Opposition at p. 15). However, no such trickery is employed.

Petitioner herself acknowledges that the Seventh Circuit relied upon dicta to conclude that the use of tear gas and flash bang grenades violated clearly established law. She suggests that reliance on dicta is permissible under this Court's qualified immunity standards citing as authority *Hope v. Pelzer*, 536 U.S. 730, 743 (2002). *Hope* involved a claim brought by inmates against prison guards alleging Eighth and Fourteenth Amendment violations when the inmate was handcuffed to a hitching post for long periods of time without being provided water or bathroom breaks. *Hope* arose in the Eleventh Circuit and this

Court made reference to a prior Eleventh Circuit case which placed officers on notice that the denial of drinking water to an inmate as punishment might be considered constitutionally impermissible conduct. This Court held that "the reasoning, though not the holding, in [that] case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that circuit." 536 U.S. at 743.

The prior Eleventh Circuit case was not dicta. Moreover, this Court observed that the prison guards were on sufficient notice and fair warning that their conduct might constitute cruel and unusual punishment because of binding Eleventh Circuit precedent, an Alabama Department of Corrections regulation, and a Department of Justice report advising as to the constitution infirmity of using a hitching post for punitive purposes. In light of all of those authorities, this Court held that a reasonable officer would be on notice that the use of a hitching post for an extended period of time was a constitutionally impermissible practice. As the officers had fair and clear warning that their conduct was unlawful, it was appropriate for the District Court to deny qualified immunity at the summary judgment stage. *Id.* at 745-46.

In sharp contrast here, the Seventh Circuit identified none of its decisions, under facts similar to those here, wherein it held that the use of tear gas and flash bangs was impermissible. "Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law." *Hamilton v. Cannon,* 80 F.3d 1525, 1530 (11th Cir. 1996).

Respondent ignores her burden in overcoming qualified immunity, a burden which requires her to offer either "a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from a court." *Lawshe v. Simpson,* 16 F.3d 1475, 1483 (7th Cir. 1994). *Brosseau v. Haugen,* 534 U.S. 194 (2004), discussed nowhere in Respondent's reply, emphasizes that identifying the clearly established right "must be undertaken in light of the specific context of the case, not as a broad general proposition." 534 U.S. at 198. In *Brosseau,* this Court reversed an appellate court determination that "general tests" set forth in the Court's Fourth Amendment jurisprudence gave officials fair warning that the conduct was unlawful. *Id.* at 199. This Court made clear that the general tests were not enough to give fair warning, nor was it an "obvious case" where general standards clearly established the answer without developed case law.

The Seventh Circuit failed to identify any factually similar cases which would satisfy the "fair-warning" standard which is this Court's standard to deprive an officer of the protection of qualified immunity. In *Hope,* Justice Stevens compared an officer's right to fair notice to the same right to fair notice a criminal defendant has when facing criminal charges. 536 U.S. at 201.

Respondent is critical of Petitioners' reliance upon *Hope,* arguing that the "fair warning" discussion in *United States v. Lanier,* 520 U.S. 259 (1997),

referenced in *Hope* does not alter the qualified immunity standard and, in fact, demonstrates that the Seventh Circuit applied a correct standard. Although this Court in *Lanier* held that a factual situation does not have to be "fundamentally similar" so as to provide fair warning, this Court emphasized that where a Court relies upon general rules, "a very high degree of prior factual particularity may be necessary." 520 U.S. at 271.

Lanier therefore supports Petitioners' argument that the Seventh Circuit erred in relying upon general propositions, dicta, and cases with very little factual similarity to conclude that the officers had "fair warning" that the use of tear gas and flash bangs was unconstitutional under the circumstances they faced. The Seventh Circuit frames the qualified immunity inquiry as being whether the questioned conduct was "clearly forbidden" by existing law. *Wernsing v. Thompson,* 423 F.3d 732, 739 (7th Cir. 2005), *cert. denied,* 547 U.S. 1004 (2006). By not relying upon cases to place the officers on notice that their conduct was "clearly forbidden," the Seventh Circuit departs from this Court's well-settled qualified immunity analysis, abandoning that analysis in favor of a significantly lesser standard.

The lesser standard employed by the Seventh Circuit, if permitted to stand, effectively eliminates the application of qualified immunity in all but the most clear-cut of cases. The lesser standard contravenes this Court's admonition in *Saucier v. Katz,* 535 U.S. 194, 205 (2001) that reasonable mistakes are

entitled to the protection of qualified immunity. Under the Seventh Circuit's standard, qualified immunity would become the exception rather than the rule even where there are no cases to place officers on fair notice and warning that their conduct was constitutionally prohibited. As a result, certiorari should be granted to address the Seventh Circuit's significant departure from traditional qualified immunity analysis.

B. The Absence Of A Split In The Circuits Is Not Necessary For This Court To Grant Certiorari To Address Whether The Law Was Clearly Established As To The Use Of Tear Gas And Flash Bang Devices

Respondent suggests that certiorari is inappropriate because Petitioners do not point to a split in the circuits as to the use of tear gas and flash bangs. No authority is cited for the proposition that a split of authority is a prerequisite to this Court granting certiorari.

The Seventh Circuit cited not a single case which would have placed the officers on fair notice and warning that their conduct in deploying tear gas, or the amount of tear gas deployed in order to drive the suicidal Escobedo out of his high rise apartment, was clearly unlawful. Likewise, the Seventh Circuit Majority Decision relies upon nothing more than dicta and *Estate of Smith v. Marasco,* 318 F.3d 497 (3rd Cir. 2003) to hold that the law was clearly

established as to the use of flash bang devices under the circumstances presented by this Court. The Seventh Circuit Majority Decision does so to the exclusion of its own controlling precedent, *Molina v. Cooper,* 325 F.3d 963 (7th Cir. 2003). *Molina* holds that it is not unreasonable for officers to use flash bang devices when they believe the only occupant of a dwelling is armed, and the officers had ample reason to be concerned about their personal safety. As Judge Manion wrote in his dissent, under the circumstances "The flash-bang devices may have been their safest option." (App. 44).

CONCLUSION

The Seventh Circuit creates a new qualified immunity standard, a standard significantly lower than the firmly established "fair warning" standard espoused by this Court on numerous occasions. Certiorari is needed to correct this error and make clear under what circumstances the use of tear gas and flash bangs may be used by police when confronting a barricaded, suicidal suspect with a gun, who is high on cocaine and refuses to voluntarily exit his high rise

apartment after more than three hours of negotiations with the Emergency Response Team.

Respectfully submitted,

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